

SETTLEMENT AGREEMENT

The North Carolina Department of Transportation, (hereinafter "Petitioner" or "DOT"), the Division of Energy, Mineral and Land Resources ("DEMLR") of the North Carolina Department of Environmental Quality ("DEQ" or "Respondent") and T&A Carolina Corp. and CARAP, LLC, (collectively "Intervenors") hereby enter into this Settlement Agreement ("Agreement") in order to resolve matters in controversy between them pursuant to N.C. Gen. Stat. §150B-31(b).

This matter arose out of DEMLR's issuance of a Dam Safety Order ("DSO") to both Petitioner and Intervenors regarding the Osceola Lake Dam (the "Dam") in Henderson County, NC, dated December 15, 2014. The DSO was issued pursuant to the Dam Safety Law of 1967, N.C. Gen. Stat. § 143.215.23 *et seq.* and the rules promulgated thereunder, 15A N.C. Admin. Code 2K.0301.

Contested case 14 EHR 10136 relates to the Osceola Lake Dam, which is approximately 30 feet high and has an impoundment capacity of approximately 500 acre-feet at the top of the Dam. The Dam is considered by Respondent to be high hazard, because failure of the Dam poses a threat to human life and property downstream, including SR 1127/Kanuga Road and an electrical substation. The following dam deficiencies were identified in the DSO: 1) Spalling and cracking of the concrete structure of the Dam, 2) depressions, ruts, and embankment degradation of the upstream and downstream slopes, 3) unknown operational condition of the early warning system, and 4) trees and other vegetation in the emergency spillway, and large trees on the upstream and downstream embankments.

On January 27, 2015, the parties jointly requested a stay of this matter in order to allow for the parties to conduct a settlement meeting. On February 10, 2015, an Order for Stay and Status

Report was issued by the Honorable Augustus B. Elkins II, requiring that a status report be filed no later than March 20, 2015. On March 20, 2015, the parties filed a Status Report with the court, notifying the court that the parties had conducted an informal settlement meeting on March 16, 2015 and remained in the process of working towards reasonable settlement of the contested case.

PETITIONER, RESPONDENT AND INTERVENORS AGREE THAT:

1. In order to avoid the cost and delay of further litigation and without admitting liability, ownership of the Dam, the extent of the DOT right of way for South Lakeside Drive (S.R. 1148), or agreeing to the alleged violations set forth in the DSO, Petitioner, Respondent and Intervenor have entered into this Settlement Agreement and have agreed to stay the matter in order to complete the actions set forth below. The parties have agreed that all parties have been correctly designated and that there is no question as to misjoinder or nonjoinder. It is understood that Petitioner is not claiming any ownership interest in the Dam or the impoundment. It is also understood that Intervenor is not in any way conceding to Petitioner's disclaimer of responsibility for Dam repairs or the DOT's contentions as to the extent of right of way for South Lakeside Drive (S.R. 1148). Nothing contained herein shall preclude the use of this Settlement Agreement in any proceeding to enforce the terms of the Settlement Agreement.

2. SCHEDULE FOR REPAIR. Without adjudication of these claims, Intervenor and Petitioner agree to repair the Dam as set forth below pursuant to the DSO, and Respondent and Petitioner agree to work diligently and in good faith in reviewing and approving application(s) and progress reports to complete such work. Specifically, the parties agree to the following schedule:

- i. Intervenor shall submit a revised application to repair the deficiencies of the dam in accordance with 15A N.C. Admin. Code 2K .0201 to Respondent for Respondent's approval by March 8, 2016. The Respondent acknowledges receipt

of the DOT Encroachment Agreement with Intervenor for the installation of the block wall connecting to the existing bridge, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference.

- ii. Following the complete submission of materials by Intervenor to Respondent pursuant to Paragraph 2(i) Respondent will conduct a review of the submitted materials in accordance with 15A N.C. Admin. Code 2K .0201 (f) and shall notify Intervenor of results within 15 working days of receipt of submittal. Intervenor shall respond to any request for additional information or revision within 15 working days of receipt of request from Respondent. Intervenor shall satisfy all reasonable requests for additional information or revision within two review cycles.
- iii. Intervenor shall begin construction of repairs of the Dam, as established in the approved application, no later than April 15, 2016. Intervenor shall submit to Respondent evidence of meeting this condition by submitting to Respondent a copy of the executed construction contract and notice to proceed no later than April 1, 2016. If the reservoir is not already lowered, the reservoir shall be immediately lowered under supervision of an engineer to a fully drained state.
- iv. The Petitioner shall be solely responsible at its expense for complete tree removal, removal of all tree root mass, backfill of all root mass voids as structural fill, and temporary vegetative stabilization of all areas disturbed for trees located on the crest of the Lake Osceola dam and upstream and downstream embankments of said dam the visible stumps of which fall within 22.5' of the centerline of South Lakeside Drive (S.R. 1148), the area marked as the 45' Right of Way for South

Lakeside Drive on the drawing entitled "Plat of Topographic Survey for Lake Osceola Dam", dated December 1, 2008 and prepared by David H. Hill, N.C.P.L.S., a copy of which is attached hereto as Exhibit "B" and incorporated herein by reference. In addition, DOT shall cut the five (5) remaining trees marked in green on the Exhibit "B" survey and complete tree removal, removal of all tree root mass, backfill of all root mass voids, and temporary vegetative stabilization for trees the visible stumps of which fall within 22.5' of the centerline of South Lakeside Drive (S.R. 1148). Such work identified above in this Subparagraph shall be performed in accordance with Paragraph 3 of this Settlement Agreement. The procedure and standards for this work shall be either as described from the specifications prepared by Mr. J. C. Bumgarner, PE dated June 4, 2015, a copy of which is attached hereto as Exhibit "C", or as described in the notes on page 2 of the plans attached to the Exhibit A encroachment agreement. These specifications are those of Mr. Bumgarner and DEMLR accepts same as reasonable and adequate standards to apply without any representation from Intervenor as to their sufficiency. Notwithstanding anything to the contrary, DOT's removal of trees equal to or smaller than six inches in diameter measured at a height of five feet may be accomplished by cutting flush to grade without requirement of root mass removal or prior written approval under the Dam Safety Law of 1967. Notwithstanding anything to the contrary, DOT does not accept any assertion that its right of way for South Lakeside Drive in (S.R. 1148) in the subject area is forty-five (45) feet wide and nothing herein is to bind or estop said agency in the future in contesting such assertion.

3. PARTIAL CERTIFICATE OF APPROVAL. This provision constitutes the Certificate of Approval for the proposed tree removal procedure for trees larger than six inches in diameter measured at a height of five feet described in Paragraph 2(iv) above with the following stipulations:

- i. Tree removal and backfill by the DOT shall be supervised by DOT's duly registered professional engineer or designee. DOT's duly registered North Carolina professional engineer or designee shall be responsible for field observation of construction as necessary to ensure compliance with approved plans in accordance with GS 143-215.29.
- ii. During construction, DEMLR may require such progress reports as are deemed necessary.
- iii. In accordance with GS 143-215.30 and 15A NCAC 2K .0203, .0212, .0215, and .0216, within 5 business days of completion of the project, Mr. J. C. Bumgarner, PE and/or a duly registered North Carolina professional engineer employed by the DOT shall inspect the completed work and upon finding that the work has been done as specified, shall file with the DEMLR two sets of record drawings, sealed by a professional engineer, and a certificate, sealed by a professional engineer, stating that the work has been completed in accordance with approved plans, specifications and other requirements.
- iv. In accordance with GS 143-215.30 and 15A NCAC 2K .0220, final written consent of the approved tree removal work must be issued by the Director of the DEMLR. Final written consent will be issued within 2 business days upon receipt by DEMLR of appropriate information identified in Paragraph 3(iii) above. In

addition, Intervenor shall maintain the water level behind the dam in a fully drained state as required by the DSO until approval to raise the water level has been granted by the Respondent as provided below in Paragraph 4.

- v. This approval does not convey the right to access the private property of others. Any required access to perform the approved work must be secured prior to initiation of construction activities. No Encroachment Agreement is necessary to conduct this tree removal work.
- vi. The Army Corps of Engineers, local floodplain manager, and the Water Resources Division of this Department should be contacted to determine if additional permits are required. Also, the erosion and sediment control program having jurisdiction should be contacted to determine permit requirements. In any case, sediment must be prevented from entering the waters of the state or flowing onto neighboring property.
- vii. It is understood that this tree removal work must be satisfactorily completed prior to the installation of the above mentioned parapet wall. Petitioner shall complete removal of trees and vegetative stabilization as stated above in paragraph 2(iv), no later than 21 days after both the signing of this Settlement Agreement and receipt of written notification from Intervenor via DOT's counsel that the water level has been lowered as described in Paragraph 3(iv). Petitioner shall notify Respondent within 2 business days of completion and request review and approval by Respondent. As part of the act of lowering the water level, Intervenor shall complete the installation of the coffer dam and drainage system to be specified in Intervenor's revised application subject to approval by the Respondent and as

reflected in the Encroachment Agreement referenced above and such completion shall be included in the notification to DOT. Intervenor shall notify Respondent within 2 business days of completion of work on the coffer dam. The construction details associated with the installation of the coffer dam and drainage system will have been included as part of Intervenor's submittal in Paragraph 2(i) and subject to Respondent's approval pursuant to Paragraph 2(ii).

- viii. Except for trees noted above in Paragraph 2(iv), which shall be the responsibility of the Petitioner, Intervenor shall be solely responsible at its expense for the removal of all other trees on the upstream and downstream embankments of the dam. Trees six inches or less in trunk diameter as measured five feet above base grade of the tree base are to be cut flush to grade with root matter left in place. Trees larger than six inches in diameter measured at a height of five feet, together with its tree root mass, shall be removed and backfill of all root mass voids performed in accordance with the standards in Paragraph 2(iv) above and the stipulations listed in this Paragraph. All denuded areas shall be vegetatively stabilized in accordance with best management practices as stated in the North Carolina Sedimentation & Erosion Control Design Manual or as described in Exhibit "C". Intervenor shall notify Respondent within 2 business days of completion of work on the coffer dam. The construction details associated with the installation of the coffer dam and drainage system will have been included as part of Intervenor's submittal in Paragraph 2(i) and subject to Respondent's approval pursuant to Paragraph 2(ii). Intervenor shall complete such tree cutting and ground stabilization no later than March 11, 2016.

- ix. Except for and subject to the timely completion of the Paragraphs 2-3 work by the Petitioner, Intervenor shall complete the remaining repairs to the Dam and shall submit as-built plans in accordance with Paragraph 3(iii) above no later than June 1, 2016. Intervenor fully understand and accept the risk of initiating construction during a winter season at the Dam location. Except as provided above in this paragraph, there shall be no acceptable reason for failure to comply with the date specified in this section. The reservoir shall remain drained until the as-built drawings are approved in writing by Respondent and Intervenor receive approval to impound from Respondent.

4. In order to allow the parties time to complete the repairs at the Dam, within 2 business days after the signing of this Settlement Agreement, the parties shall request an Order to stay the proceedings of this matter until June 10, 2016 so that the following can occur:

- i. Upon receipt by Respondent of the as-built drawings for all required dam repairs established in Paragraph 3 of this Agreement, Respondent will within 10 business days perform a final inspection of the completed repairs and issue a written certificate entitled "Approval to Impound" addressed to both Petitioner and Intervenor if requirements have been met and no other deficiencies have been found. The "Approval to Impound" will mean that all requirements of the DSO have been satisfied.
- ii. Upon receipt of the "Approval to Impound" from Respondent, Petitioner shall, within 15 days, submit a Voluntary Dismissal to Withdraw the Petition with prejudice in this contested case pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 41(a).

iii. Should the parties not be able to meet the terms of this Agreement, including the deadlines for completion of the tasks identified above, the parties agree that any party may seek to lift the Stay and request a Scheduling Order from the court upon appropriate motion.

5. Nothing in this Agreement shall restrict the right of the Respondent to inspect or take enforcement action against Intervenor or Petitioner for any new or subsequent violations of the Dam Safety Law of 1967 and the relevant rules promulgated thereunder arising outside of the acts and omissions alleged in the DSO or addressed within this Agreement. Similarly, nothing in this Agreement shall restrict the right of Intervenor or Petitioner to contest a new or subsequent enforcement action arising outside of acts and omissions alleged in the DSO or addressed within this Agreement.

6. The parties agree that the consideration for this settlement is the promises contained herein and that this Agreement contains the whole agreement between them.

7. This Agreement shall be binding upon the parties, their successors and assigns, upon execution by the undersigned, who represent and warrant that they are authorized to enter into this agreement on behalf of the parties hereto.

8. Nothing in this Agreement shall relieve Intervenor or Petitioner of their obligations to comply with all applicable federal, state and local laws and regulations.

9. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

10. The terms of this Agreement shall become effective upon the signature of the last party to approve the Agreement.

WHEREFORE, the parties agree to be bound by the terms of the Settlement Agreement.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL
QUALITY, DIVISION OF ENERGY, MINERAL, AND LAND RESOURCES

By: 

Tracy E. Davis, PE, CPM
Director, DEMLR

TRACY E. DAVIS Director, DEMLR
Printed Name & Title of Signer

Date: FEBRUARY 29, 2016

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

By: 

Michael L. Holder, PE
Chief Engineer

MICHAEL L. HOLDER / CHIEF ENGINEER
Printed Name & Title of Signer

Date: 2/29/16

T&A Carolina Corp. and CARAP, LLC

By: 

Todd Leoni

Todd Leoni President and Managing Member
Printed Name & Title of Signer

Date: 3/3/16